NO. 21626

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM JOSEPH COUGHLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTIONAL STATEMENT

On September 29, 1966 a one-count indictment was returned by the Grand Jury for the Southern District of California [C. T. 2-3]. 1/

The indictment charged that on September 12, 1966 Robert James Coughlan by force, violence, and intimidation, with the use of a pistol, knowingly and willfully attempted to take money from a teller of a bank insured by the Federal Savings and Loan Corporation.

1/ C. T. refers to Clerk's Transcript of Record.

Further, that the appellant William Joseph Coughlan aided, abetted, counseled, induced and procured the commission of the above offense.

On October 10, 1966 the appellant and Robert Coughlan appeared with appointed counsels and entered pleas of not guilty [C. T. 5].

On November 1, 1966 Robert Coughlan pleaded guilty to the indictment [C. T. 7].

On November 1, 1966 appellant William Coughlan waived his rights to trial by jury and a court trial commenced. The appellant moved to suppress certain statements and a hearing was held. The court ruled the statements admissible. The appellee and appellant stipulated to the admission of certain testimony and facts. The court found the appellant guilty as charged [C. T. 6-7].

On November 28, 1966 the appellant was placed on three years probation pursuant to the terms of Title 18, United States Code, Section 5010(a) [C. T. 10].

On December 5, 1966 the appellants' Motions for New Trial and for Findings of Fact and Conclusion of Law were denied [C. T. 11].

Appellant filed a timely Notice of Appeal on December 5, 1966 [C. T. 12].

The offense occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 2113(a)(d) and Title 18, United States Code, Section 2. This Court has jurisdiction to

entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 18, United States Code, Section 2113(a)(d) provides in pertinent part:

> "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to or in the care, custody, control, management, or possession of, any bank; or any savings and loan association . . . ."
>
> "(d) Whoever, in committing or attempting to commit, any offense defined in subsections (a) . . ., assaults any person, or puts into jeopardy the life of any person by the use of a dangerous weapon or device, ..."

Title 18, United States Code, Section 2 provides in pertinent part:

> "2(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

III

STATEMENT OF FACTS

On the morning of September 12, 1966, appellant William Coughlan borrowed an automobile from the Trosper family [R. T. 59]. [2/] Later that day Robert Coughlan while using a loaded pistol attempted to rob the Coast Federal Savings and Loan Association in Panorama City, California. The pistol and ammunition were taken from the home of Joseph Coughlan, father of Robert and William Coughlan [R. T. 59, lines 22-25].

Robert Coughlan was observed leaving the bank in the Trosper's automobile. The rear license plate was covered with mud [R. T. 59]. That afternoon appellant William Coughlan was arrested by F. B. I. agents and officers of the Los Angeles Police Department while driving the Trosper automobile [R. T. 16, 59]. After his arrest he was taken to the Los Angeles Police Department. He was interviewed by Agent Irvin Wells of the Federal Bureau of Investigation. Agent Wells advised appellant of his rights, and, when the appellant told the agent he desired to make no statement, the interview was terminated [R. T. 11, 17, 42].

On September 13, 1966, the appellant was taken before the Commissioner and Attorney Bernard Winsberg was appointed to represent him [R. T. 10-11; 23].

Subsequent to September 13, 1966, and prior to September

2/ R. T. refers to Reporter's Transcript.

15, 1966, pictures which had been taken at the bank were developed and it was discovered that Robert Coughlan was the individual who had attempted to rob the bank [R. T. 17, 49].

On September 15, 1966, Agent Wells along with another F. B. I. agent and Sergeant Seret of the Los Angeles Police Department went to 19708 Valley View Drive, Topanga, to locate and arrest Robert Coughlan [R. T. 18, 49]. The house at the above address is owned by Joseph F. Coughlan, the father of appellant and Robert Coughlan [R. T. 47]. The appellant lived with his parents at that address [R. T. 37]. Agent Wells had a conversation with Joseph Coughlan. He told Mr. Coughlan that certain negatives had been developed and they identified Robert Coughlan as the one who had attempted to rob the bank. Agent Wells then asked where he could find Robert Coughlan and Mr. Coughlan informed him that he did not know [R. T. 49]. Agent Wells then asked Joseph Coughlan "How is Bill" [R. T. 30, lines 8-9]. Mr. Coughlan replied that he had seen William Coughlan that morning and that he did not believe his son had received any visitors [R. T. 30]. He then recommended to Agent Wells that he go see William [R. T. 18, lines 20-21]. Agent Wells testified the father had said, "Why don't you go by and see Bill" [R. T. 30, lines 16-17], or "I recommend you see Bill", or "Might stop by" [R. T. 34, lines 8-10]. At that time Agent Wells decided to go back and see William Coughlan [R. T. 30].

Joseph Coughlan did not recall the above conversation [R. T. 49]. He was sure however that he did not tell the officers

they could represent to Bill that his father asked him to cooperate [R. T. 50].

On September 16, 1966, Agent Wells, F. B. I. Agent Jim Cagnassola and Detective Seret went to the County Jail to interview William Coughlan [R. T. 12, 19]. Appellant came into the interview room dressed in prisoner's blues and sat on the prisoner's side of the bench. The three officers sat across from the appellant facing him [R. T. 20]. Appellant did not appear to be nervous, agitated or upset. He was asked if he desired anything [R. T. 19].

At the outset of this interview appellant was advised of his rights. "He was advised that he did not have to make any statement, that any statement he did make could be used against him in a court of law. He was advised of his right to talk to an attorney or anybody else prior to the interview. He was told, if he so desired, his attorney could be present during the interview. He was further told that if he decided to make a statement at that time and any time during the interview he decided he did not want to answer any further questions, he could then stop." [R. T. 13, lines 5-15].

Appellant told the officers that he had an appointed attorney [R. T. 23, lines 12-14]. Appellant was then given his rights on a written form which was attached to a waiver of rights form. He read the rights and said he understood them. He said that he would be willing to talk but did not want to sign the paper [R. T. 21].

Agent Wells then advised the appellant that they had seen his father and that "Your father suggested" or "recommended"

that the agents come by to see him [R. T. 22, lines 7-9; 32, lines 7-8; 33, lines 4-10]. The appellant was not told that his father said he should make a statement [R. T. 22, 33].

Agent Wells advised appellant that he could make a statement, or not make a statement, whichever he desired. He told appellant to make a statement only if appellant thought making a statement would be beneficial to him. He told appellant that if he did not feel it would be beneficial to him, by all means he should not make a statement [R. T. 23, lines 3-7]. Appellant was not told it would help him if he made a statement [R. T. 24, lines 24-25, line 5]. The appellant did not immediately make any statement, he sat and thought [R. T. 24]. During the course of the interview he paused in a similar manner various times [R. T. 24].

Sergeant Seret told appellant "that inasmuch as he was charged with bank robbery that in all probability the state would not desire to prosecute him on a marihuana charge and that he would discuss this matter with the state authorities to determine if they would desire to prosecute him for possession of narcotics" [R. T. 25, lines 1-6]. Appellant was not told if he made a statement the charges would be dropped [R. T. 25, lines 14-23]. Sergeant Seret left the interview room and returned in approximately 20 minutes [R. T. 26]. During this time Agents Wells and Cagnassola talked to appellant in generalities. Appellant made no statement [R. T. 26]. When Sergeant Seret returned to the room he told appellant he had discussed the marihuana charge with state authorities and they decided not to prosecute [R. T. 27].

Approximately five to ten minutes later appellant made the following statement to the officers [R. T. 27, lines 14-15]:

"Thereafter Bill advised me that he and his brother Robert wanted to get away from their parents' home and get out on their own. He stated that they had no money.

"He noted that Robert had no automobile, that he had a motorcycle which was not in running condition.

"He stated that they decided to commit a robbery.

"Thereafter he noted that they decided to commit only one robbery.

"Q. Any particular kind of robbery, sir?

"A. He initially said they decided to commit a robbery. He thereafter stated that they decided to commit a bank robbery.

"He pointed out that they assumed that they could get approximately $2,000 from one cash drawer in a bank. He said this is all they intended to get.

"He said that Robert decided that they should rob a bank which had a large parking lot to the rear and a fence over which the person who robbed the bank could make an escape and get to an automobile, thus preventing the license number to be copied.

"He then told me that on Sunday night,

September 11, 1966, he called Betty Trosper and asked her if he could borrow her mother's automobile. She told him he could have it and she would leave the car in the driveway with the keys in it.

"He said that he got this car for the express purpose of a bank robbery.

"He said on the following day, which would be Monday, September 12, 1966, he hitchhiked from his home in the Topanga area to the Trosper residence on Van Noord Avenue where he got the car and brought it to his house.

"He pointed out that when he got to his house he parked the car a little distance away from the residence to prevent neighbors from seeing it.

"He said that Robert then told him to put mud on the rear plate of the automobile to prevent the license from being copied, which he did.

"He stated that he then went into the house and got a gun from a gun cabinet. He said the gun was his father's. He got it to give to Robert. He said the gun was for the express purpose of a bank robbery.

"He said he then stayed at the house and Robert took the car and the gun and left. He said he did not know where Robert went. He only knew that Robert was supposed to be going to commit a

bank robbery, but he didn't know where the bank was.

"He said that Robert returned about, to the best of his knowledge, 2:00 o'clock that afternoon and related to him that he had attempted to rob a bank and gave him certain details about it. Thereafter they went to a friend's house for a while. He then returned the car to the Trosper residence that afternoon, at which time he was arrested by FBI agents and officers of the Los Angeles Police Department." [R. T. 13, lines 20 to 16, line 4].

The interview lasted approximately 20 - 25 minutes [R. T. 44].

IV

ERRORS SPECIFIED BY APPELLANT

The appellant has specified the following points on appeal:[3/]

A. The Confession Admitted Was Not Free and Voluntary in That It Was Brought About by an Inducement, a Reward, and a Completed Promise of Immunity From State Prosecution.

3/ Appellant's Opening Brief, page 11.

V

ARGUMENT

A. THE TRIAL COURT WAS CORRECT IN FINDING THAT APPELLANT, HAVING BEEN REPEATEDLY WARNED OF HIS RIGHTS, KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL.

A failure to have counsel present at the time a confession is given cannot be said to ipso facto render the confession involuntary and inadmissible. United States v. Plata, 361 F. 2d 958 (7th Cir. 1966); United States v. Thomas Patrick Smith, No. 15878, 7th Cir. June 22, 1967: corrected to No. 15878, April Session 1967. This is so even where the declarant is of young age and alleged veiled threats are present. Butterwood v. United States, 365 F. 2d 380 (10th Cir. 1966). Rather, where it is clear that proper warnings concerning the right to counsel and right to remain silent were given, the case should be scrutinized on its facts to determine the question of knowing and intelligent waiver. Narro v. United States, 370 F. 2d 329 (5th Cir. 1966).

In examining the context of an accused's confession in the absence of counsel, an "awareness" of one's right to advice of counsel has been said to be the threshhold requirement for an intelligent decision as to its exercise. Miranda v. Arizona, 384 U.S. 436 (1966). In our case, before the statement made on September 16, 1966, appellant had been repeatedly informed in clear and unequivocal terms of his rights. Immediately following

his arrest on September 12, 1966, appellant was advised of his constitutional rights [R. T. 11, 17, 42]. Appellant must have understood his constitutional safeguards for he told Agent Wells he refused to make a statement. The interview was immediately terminated [R. T. 11]. Thus, at that time appellant was made to realize that the F. B. I. agents were prepared to respect his rights if he desired to exercise them. The following day appellant was taken before the United States Commissioner. The Commissioner advised the appellant of his rights and appointed an attorney to represent him [R. T. 10-11, 23]. Finally, at the outset of the interview on September 16, 1966, appellant was both orally and in writing given another complete and explicit reminder of his constitutional rights to remain silent and to have an attorney present at an interview should he choose to make a statement [R. T. 23]. Appellant told the officers that counsel had been appointed to represent him. Further, he stated that he read the written statement of his rights and understood them. He said that he would be willing to talk but did not wish to sign the paper [R. T. 21].

The Constitution cannot force an unwanted attorney upon a defendant. Minor v. United States, 375 F. 2d 170 (8th Cir. 1967). After an adequate warning of rights has been given "the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement". Miranda v. Arizona, supra, at 479. There is no evidence that the defendant ever asked for or was denied the assistance or access of counsel at the time

of his conversations with Agent Wells and Sergeant Seret. Rather, the record indicates that appellant made a rational decision to make a statement without the presence of his attorney, being fully aware that his attorney could be present if he so desired [R. T. 21, 23].

And appellant's reason for not signing the printed waiver of his rights form, which he had read, was not related to any reluctance to speak. Rather, it was a reluctance to furnish his signature. "He said he would be willing to talk to us, but he did not want to put his signature to the paper." [R. T. 21].

The "affirmative waiver" required by Miranda need not be a written waiver. The written waiver forms are no more than an aid to the prosecution in establishing that an accused understood and waived his rights. For in some cases it is difficult for the prosecution to sustain its heavy burden without this physical evidence. An accused may testify that the law enforcement officers never advised him of his rights. It is in this circumstance that a written waiver is most helpful. However, that is not the situation in our case. Appellant is not asserting any failure of Agent Wells to comply with the specific warning requirements of Miranda and Escobedo.

As the record reflects at pages 56 and 57, the trial judge clearly understood "the serious and weighty responsibility he had of determining whether there was an intelligent waiver by defendant". Johnson v. Zerbst, 304 U.S. 458 at 465 (1938). He had the opportunity to observe the demeanor and intelligence of the

appellant while he testified. He concluded that the appellant orally waived his rights and made a statement [R. T. 57]. On the basis of the record his conclusion was correct.

B. APPELLANT'S VOLUNTARY STATEMENT WAS NOT THE PRODUCT OF AN IMPLIED PROMISE OR IMPROPER INFLUENCE.

Appellant contends the trial court erred in its determination that his statements were freely and voluntarily given to Agent Wells. He contends that he was psychologically coerced into making the statements. His attack is twofold. First, he alleges that statements made by Agent Wells concerning conversations with his father, Joseph Coughlan, amounted to improper influence. Second, he alleges that his statement was prompted by a promise of immunity from state prosecution coupled with the likelihood of federal probation.

On both of the above points there is a conflict in the testimony. As to the first point Agent Wells testified he told appellant that Joseph Coughlan had "suggested" or "recommended" that he come by to see appellant [R. T. 22, lines 7-9; 32, lines 7-8; 33, lines 4-10]. The appellant was not told that his father said he should make a statement [R. T. 22, 33]. On the other hand, appellant testified that Agent Wells told him his father said "that it would be better if I made a statement, that I would co-operate all the way with the FBI" [R. T. 39, lines 12-14]. As to the second

point Agent Wells testified the appellant was not told that if he made a statement certain state marihuana charges against him would be dropped [R. T. 25]. Rather appellant was informed that the state did not desire to prosecute on the marihuana charge in that he was being held and charged with bank robbery [R. T. 37]. Appellant testified he was told that it would be possible to get probation on the federal charge, but that if he had another state charge for marihuana he would not get probation [R. T. 40, 45]. Further, appellant testified that Detective Seret implied that the marihuana charges would be dropped if appellant made a statement about the bank robbery [R. T. 45].

The trial judge heard the testimony of the witness and recognized these discrepancies. He resolved these factual questions in favor of the appellee by finding the statement free and voluntary [R. T. 56-57]. Viewing this evidence in the light most favorable to the government was the judge correct in ruling?

"Confessions remain a proper element in law enforcement and when given freely and without any compelling influences are admissible in evidence." Cox v. United States, 373 F. 2d 500 (8th Cir. 1967). The standards employed by the courts to assess the voluntariness of an accused's statements have emphasized a variety of factual criteria. Appellee contends that appellant is not able to bring his situation within the facts of the "coercion" cases that he claims are controlling. No threats of retribution against his family are asserted here as in Spano v. New York, 360 U. S. 315 (1959). In fact none of the usual indicia of duress

were present in this case. The appellant was 20 years of age [R. T. 41]. The interview lasted approximately 20-25 minutes [R. T. 44]. It was not excessively lengthy as in Haley v. Ohio, 332 U.S. 596 (1948), nor was defendant kept incommunicado for a lengthy period of time as in Haynes v. Washington, 373 U.S. 503 (1963).

The Second Circuit recently pointed out that the language "implied promises, however slight", has never been applied with wooden literalness. The Supreme Court has consistently made clear that the test of voluntariness if ultimately whether an examination of all the circumstances discloses the conduct of law officers was such as to overbear the defendant's will to resist and bring about a confession. United States v. Ferrara, 377 F. 2d 16 at 17 (2nd Cir. 1967). In the Ferrara case a statement by a federal agent to defendant that if the accused cooperated he would see what could be done about reducing bail was not considered the type of inducement contemplated by the phrase coercion. In the case before this Court no offer or promises were made to appellant concerning the state charges pending against him. The fact that Detective Seret reappeared during the interview and announced the state charges were to be dropped cannot be said to have been a type of coercion directed towards eliciting a confession from defendant. Even if this Court should find that statement coercive, it is important when examining coercion that there be a nexus between any overreaching by interrogating agents and defendant's confession to render a confession involuntary. United States v.

Morariety, 375 F. 2d 901 (7th Cir. 1967); Fernandez-Delgado v. United States, 368 F. 2d 34, 36 (9th Cir. 1966). Here appellant was informed the charges were to be dropped prior to making a statement.

The fact that Agent Wells told appellant his father had "recommended" they see him cannot be said to have created the kind of atmosphere of inducement, nor was it the kind of illegal technique, contemplated by the courts in finding involuntariness. Davis v. North Carolina, 384 U. S. 737 (1966).

VI

CONCLUSION

For the reasons set forth herein, the Government respectfully requests that the judgment and conviction of appellant be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Roger Browning
ROGER BROWNING